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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE:



[EAC 01 201 50823]

OFFICE: VERMONT SERVICE CENTER

DATE:

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IN RE:

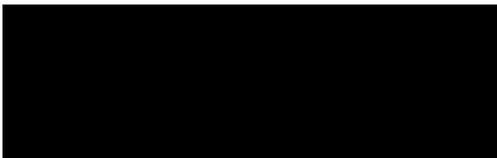
Applicant:



APPLICATION:

Application for Temporary Protected Status under Section 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The application was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant is a native and citizen of El Salvador who is seeking Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The director denied the application because he had been convicted of a felony and a misdemeanor committed in the United States. The director, therefore, denied the application.

On appeal, counsel submits a statement.

Section 244(c) of the Act, and the related regulations in 8 C.F.R. § 244.2, provide that an applicant who is a national of a foreign state is eligible for TPS only if such alien establishes that he or she:

- (a) Is a national of a state designated under section 244(b) of the Act;
- (b) Has been continuously physically present in the United States since the effective date of the most recent designation of that foreign state;
- (c) Has continuously resided in the United States since such date as the Attorney General may designate;
- (d) Is admissible as an immigrant except as provided under section 244.3;
- (e) Is not ineligible under 8 C.F.R. § 244.4; and
- (f)
  - (1) Registers for Temporary Protected Status during the initial registration period announced by public notice in the FEDERAL REGISTER, or
  - (2) During any subsequent extension of such designation if at the time of the initial registration period:
    - (i) The applicant is a nonimmigrant or has been granted voluntary departure status or any relief from removal;
    - (ii) The applicant has an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal which is pending or subject to further review or appeal;
    - (iii) The applicant is a parolee or has a pending request for reparole; or
    - (iv) The applicant is a spouse or child of an alien currently eligible to be a TPS registrant.

An alien shall not be eligible for temporary protected status under this section if the Secretary of the Department of Homeland Security finds that the alien has been convicted of any felony or two or more

misdemeanors committed in the United States. See Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a).

8 C.F.R. § 244.1 defines "felony" and "misdemeanor:"

*Felony* means a crime committed in the United States, punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except: When the offense is defined by the State as a misdemeanor and the sentence actually imposed is one year or less regardless of the term such alien actually served. Under this exception for purposes of section 244 of the Act, the crime shall be treated as a misdemeanor.

*Misdemeanor* means a crime committed in the United States, either

- (1) Punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or
- (2) A crime treated as a misdemeanor under the term "felony" of this section.

For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor.

The record reveals the following offenses:

- (1) On May 3, 1995, in the First District Court of Nassau County, New York, Docket No. [REDACTED] (arrest date April 9, 1995), the applicant was convicted of driving while ability impaired, VTL 1192.1. He was placed on probation for a period of one year, ordered to pay a fine in the amount of \$375 or spend 5 days in jail, and his driver's license was suspended for 90 days.
- (2) On May 1, 1998, in the District Court of the County of Suffolk, First District Court Central Islip, New York, Docket No. [REDACTED] (arrest date March 14, 1998), the applicant was convicted of operating a motor vehicle under the influence of drugs or alcohol (DWI), VTL 1192.3, a misdemeanor. He was placed on probation for a period of 3 years, ordered to pay \$650 in fine, and his driver's license was revoked for 6 months.

The record contains a computer printout of additional convictions in New York relating to the applicant. However, this printout was not certified by the court, nor did the applicant furnish the actual court documents for these offenses:

- (3) On September 16, 1997, the applicant was convicted of operating a motor vehicle by an unlicensed driver, VTL 509.1. He was fined \$150 (arrest date July 26, 1997).
- (4) On March 28, 1997, the applicant was convicted of aggravated unlicensed operation of a motor vehicle, VTL 511.1, a misdemeanor. He was fined \$200 (arrest date November 5, 1996).
- (5) On June 23, 1999, the applicant was convicted of disorderly conduct, PL 240.20. He was fined \$100 (arrest date April 12, 1999).
- (6) On January 27, 2000, the applicant was convicted of facilitating aggravated unlicensed operation, VTL 511A.1, a misdemeanor. He was fined \$200 (arrest date September 3, 1998).

On appeal, counsel asserts that the applicant has only one misdemeanor offense because VTL 1192.1, driving while ability impaired (No. 1 above), is a traffic violation, and not a misdemeanor.

New York VTL 1193.1 states that driving while ability impaired (VTL 1192.1) shall be a traffic infraction, VTL 1193.1 further states that this crime "shall be punishable by a fine of not less than three hundred dollars nor more than five hundred dollars or by **imprisonment in a penitentiary or county jail for not more than fifteen days**, or by both such fine and imprisonment." (Emphasis added). Consequently, for immigration purposes, this offense is a "misdemeanor" as defined by 8 C.F.R. § 244.1.

The director determined that the applicant's conviction of DWI, detailed in No. 2 above, was a felony because this conviction was a DWI-2<sup>nd</sup> offense. New York Vehicle & Traffic Law, section 1193(c), states that a person who operates a vehicle in violation of 1192.2, 1192.3, or 1192.4 after having been convicted of a violation of 1192.2, 1192.3, or 1192.4, within the preceding ten years, shall be guilty of a class E felony, and shall be punished by a fine of not less than \$1000 nor more than \$5000 or by a period of imprisonment as provided in the penal law, or by both such fine and imprisonment. The record shows that the applicant was convicted of VTL 1192.1 and VTL 1192.3 (Nos. 1 and 2 above). The court, in this case, did not convict the applicant of a 2<sup>nd</sup> offense DWI or a felony offense on May 1, 1998 (No. 2 above) pursuant to VTL 1193(c), nor was he punished pursuant to VTL 1193(c). Therefore, this finding of the director is withdrawn.

The applicant, however, is ineligible for TPS due to his record of at least two misdemeanor convictions detailed in Nos. 1 and 2 above, and because he failed to provide the actual final court dispositions of the offenses detailed in Nos. 3, 4, 5, and 6 above. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, the director's decision to deny the application will be affirmed.

An alien applying for temporary protected status has the burden of proving that he or she meets the requirements enumerated above and is otherwise eligible under the provisions of section 244 of the Act. The applicant has failed to meet this burden.

**ORDER:** The appeal is dismissed.